Nos. 22,109 and 22,109-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IONE THOMSON, CYNTHIA FARVER, WALTER THOMSON, TRUSTEES FOR DISSOLVED AERO SALES CO.,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

WALTER THOMSON and IONE THOMSON,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
Assistant Attorney General.

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I N D E X

CITATIONS

Cases:

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 119-137) are not officially reported.

JURISDICTION

This petition for review (I-R. 203-205) involves federal income taxes for the taxable years 1954 and 1955. On December 31, 1962, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency, asserting deficiencies in the aggregate amount of $21,921.99. (I-R. 6, 17.) Within 90 days thereafter, on March 28, 1963, taxpayers filed petitions with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-3, 13-15.) The decisions of the Tax Court were entered February 1, 1967. (I-R. 197, 202.) The case is brought to this Court by a petition for review filed April 21, 1967 (I-R. 203-205), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly determined that five-sixths of the amount taxpayers received in settlement of an antitrust suit is taxable as ordinary income under the provisions of Section 61(a) of the Internal Revenue Code of 1954.

2. Whether the entire amount received in a compromise settlement of a civil action against the United States is taxable as ordinary income under the same provisions.[1/]

1/ Taxpayers attempt to raise two other issues which were not considered below and thus are not properly presented on appeal. The taxation as dividends of certain receipts (Appendix to Petitioner's Brief, p. B-13) was not presented below at any time. The question of the treatment of a capital loss (id., p. B-6) was first raised in the Tax Court in Rule 50 proceedings, and the Tax Court correctly ruled that the new claim could not be raised at that time. Bankers Coal Co. v. Burnet, 287 U.S. 308 (1932); Fifth Street Bldg. v. Commissioner, 77 F. 2d 605 (C.A. 9th, 1935).

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 61. GROSS INCOME DEFINED.
>
> (a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> * * *
>
> (26 U.S.C. 1964 ed., Sec. 61.)

STATEMENT

Taxpayers Walter Thomson and Ione Thomson (hereinafter sometimes referred to as the individual taxpayers) are husband and wife residing in Los Angeles, California. They each filed individual federal income tax returns on the cash basis for the calendar year 1954, and they filed a joint federal income tax return on the cash basis for the calendar year 1955. (I-R. 120.)

Aero Sales Company (hereinafter referred to as ASCo.), now dissolved but represented by individual trustees (the individual taxpayers, and Cynthia Farver), was a Texas corporation which filed its federal income tax returns on the cash basis for the calendar years 1954 and 1955. ASCo. was organized in 1947 to handle scrap metal. (I-R. 121.)

Shortly after World War II, upon being assured by several steel companies of an available supply of steel, Walter constructed a plant outside Houston, Texas, which was known as Texas Tank Company (hereinafter referred to TTCo.). TTCo. was a proprietorship organized to manufacture propane and butane tanking equipment. (I-R. 121.)

On January 18, 1950, ASCo. and the individual taxpayers doing business as TTCo., began a civil action in the United States District Court against a dozen or more steel companies. The complaint was filed under the Clayton Act, i.e., Act of October 15, 1914, c. 323, 38 Stat. 730, Sec. 4 (15 U.S.C. 1964 ed., Sec. 15); and requested triple damages for violation by defendants of the Act of July 2, 1890, c. 647, 26 Stat. 209, Sec. 1 (15 U.S.C. 1964 ed., Sec. 1), commonly known as the Sherman Anti-Trust Act. (I-R. 122-123.)

The complaint alleged that the defendants and coconspirators engaged in an unlawful combination and conspiracy to restrain interstate trade and commerce in steel products by refusing to sell such products to customers other than "old," "regular," or "historical" customers. The complaint, as amended, claimed damages as follows (I-R. 123):

	Expected Profits	Loss of Value of Assets	Simple Damages	Damages Trebled
ASCo.	$ 665,700	$101,500	$ 767,200	$2,301,600
Walter & Ione, d/b/a TTCo.	1,881,800	130,000	2,011,800	6,035,400
Total	$2,547,500	$231,500	$2,779,000	$8,337,000

The plaintiffs therein presented their evidence to a jury. At the trial plaintiff Thomson was not allowed to testify as to the amounts of estimated profits which TTCo. would have earned but for the acts of the defendants. The trial court judge sustained defendants' objections to such estimate on the grounds that no sufficient foundation was laid. However, plaintiffs were allowed to introduce into evidence a report, prepared by one of the defendant steel companies, which gave an estimate

of TTCo.'s potential profits. That report would support a verdict of $500,000 for loss of profits. The trial judge, however, was skeptical of the value of said report for determining damages. (I-R. 123-124.)

All the defendants moved to dismiss at the close of their evidence, and these motions were argued orally. Before the court ruled on the motions to dismiss, the parties entered into a compromise settlement wherein the plaintiffs received a net payment of $47,686.55. The anti-trust case was closed in March 1955. The parties executed a general release and a dismissal with prejudice was filed. The release recited formal matters only and stated consideration of $10. (I-R. 124.)

On August 10, 1949, ASCo. commenced a civil action against the United States in the Court of Claims of the United States. The petition set forth six separate causes of action and claimed damages in the amount of $14,956. The first cause of action claimed damages for unpaid commissions in the amount of $2,775. The remaining five causes of action alleged that certain shipments of metal were received from the War Assets Administration, an agency of the United States, and that the metal was either defective or did not meet specifications of the sales document forwarded by that Administration. In regard to said shipments of metal, ASCo. claimed damages for the following: (1) unpaid commissions and damages for imperfect merchandise; (2) various items of cost incurred in connection with several shipments relating to freight charges, storage, handling and loading, and use of heavy equipment; and (3) in one instance, the sales price of $3,004.87 paid on a shipment which was returned to the War Assets Administration. (I-R. 122.)

Prior to trial of the foregoing suit, the United States had filed a civil action against ASCo. in the United States District Court, Houston, Texas, to collect an unpaid invoice due and owing the War Assets Administration for approximately $7,000. (I-R. 122.)

Before going to trial, the parties in 1954 entered into a compromise settlement wherein ASCo. received $1,182 and cancellation of the above-said unpaid invoice. (I-R. 122.)

The individual taxpayers did not include the payment of $47,686 received in settlement of the antitrust suit in their taxable income for 1955 because they thought that it was a nontaxable recovery of capital. ASCo. did not include in income the $1,182 received in 1954 in compromise settlement of the Court of Claims case because it believed it was a nontaxable capital recovery. (I-R. 126.)

For the year 1955 the Commissioner included $36,356 in the individual taxpayers' income, and $11,330 in ASCo.'s income on the ground that the $47,686 received in settlement of the antitrust suit represented recovery of lost profits. The Commissioner included $1,182 in ASCo.'s 1954 taxable income on the ground that it also represented lost profits. (I-R. 126-127.)

Taxpayers filed petitions in the Tax Court for the redetermination of the deficiencies produced by the inclusion of the above amounts in their taxable income. (I-R. 1-3, 13-15.) The Tax Court held that five-sixths of the payment in settlement of the antitrust suit was for loss of profits, and that one-sixth was for injury to the business. (I-R. 129-132.)

It held that the entire payment in settlement of the Court of Claims suit was for loss of profits. (I-R. 127-129.) This appeal followed. (I-R. 203-205.)[2/]

SUMMARY OF ARGUMENT

The Tax Court correctly held that five-sixths of the amount taxpayers received in settlement of the antitrust suit was taxable as ordinary income. Whether a settlement payment is taxable as ordinary income or as a return of capital depends on the nature of the underlying action. After considering the complaint and the evidence presented in the settled action, the Tax Court correctly decided that two-thirds of the payment was received in lieu of punitive damages and that the remaining one-third represented ordinary income and capital return in equal proportions.

The Tax Court also correctly held that the entire payment received in settlement of the action against the United States was taxable as ordinary income, since the taxpayer failed to sustain his burden of proving that another designation of the payment was proper.

2/ Two separate issues, concerning depreciation and business expenses, were considered below but are not presented on appeal.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT FIVE-SIXTHS OF THE AMOUNT TAXPAYERS RECEIVED IN SETTLEMENT OF THE ANTI-TRUST SUIT WAS TAXABLE AS ORDINARY INCOME

Whether an amount received in settlement of legal action represents ordinary income under Section 61(a) of the Internal Revenue Code of 1954, supr or a return of capital depends on the nature of the underlying action. Carter's Estate v. Commissioner, 298 F. 2d 192 (C.A. 8th, 1962); Raytheon Production Corp. v. Commissioner, 144 F. 2d 110 (C.A. 1st, 1944). That is, if an action seeks damages for loss of profits, any payment made in settlement of the case is taxable as ordinary income. Likewise, if an action is brought for damages for injury to a business or to capital, a settlement payment is treated as a return of capital.

In order to determine, for tax purposes, the nature of the settlement payment received, the courts look at the complaint in the underlying action, the settlement agreement, the written release, and any other evidence indicating whether the settlement payment was received in lieu of ordinary income or return of capital. Freeman v. Commissioner, 33 T.C. 323 (1954); Carter's Estate, supra. This Court has stated that in determining whether a receipt represents ordinary income or return of capital "it is the nature underlying claim that controls." Spangler v. Commissioner, 323 F. 2d 913, 916 (C.A. 9th, 1963). Obviously, the best evidence of the underlying claim is the complaint in the settled action.

In determining the nature of the settlement payment made in the antitrust suit in the present case, the Tax Court considered both the complaint in the case and the evidence presented to the jury. Neither

the settlement agreement nor the release indicated a specific breakdown of the lump-sum payment. Therefore, the court acted on the "reasonable assumption" that the settlement was intended to satisfy all the various claims made in the suit. Telefilm, Inc. v. Commissioner, 21 T.C. 688 (1954), reversed on other grounds (C.A. 9th), decided May 2, 1955 (55-1 U.S.T.C., par. 9453).

The complaint requested punitive damages. Therefore, the Tax Court was correct in allocating two-thirds of the settlement payment to punitive damages, since they are awarded automatically if compensatory damages are found. Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (C.A. 8th, 1945). Thus, two-thirds of the payment, received in lieu of punitive damages, must be taxed, as would be punitive damages, as ordinary income. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

Taxpayer objects to the "retroactive" application of the Glenshaw decision to the facts of his case. This, however, is not a retroactive change in the law, but a change in the interpretation of existing law.[3/] Taxable income is a changing concept, and, as it was possible to redefine income so as to tax the punitive damages received by the taxpayers in Glenshaw, supra, it is also proper to apply this decision to the taxpayers in the present case. The design of the Internal Revenue Code is to reach all gain that is constitutionally taxable,

3/ Retroactive income taxation is, however, a constitutional power of Congress. 1 Mertens, Law of Federal Income Taxation (Rev.), Section 4.14. Furthermore, the Commissioner is permitted to change prior rulings, determined to be based on a mistake of law, by new rulings having a retroactive effect. Automobile Club v. Commissioner, 353 U.S. 180 (1957); Wolinsky v. United States, 271 F. 2d 865 (C.A. 2d, 1959).

and there is no constitutional barrier to taxation of punitive damages. Cf. Glenshaw, supra, p. 429.

In determining the nature of the remaining one-third of the settlement payment the Tax Court had a duty to make an approximate allocation in light of the information before it. Cohan v. Commissioner, 39 F. 2d 540 (C.A. 2d,1930). Since approximately 91% of the damages claimed by taxpayers were for lost profits (I-R. 123), but very little evidence concerning lost profits was admitted at the trial of the antitrust suit, the Tax Court determination that the compensatory damages represented ordinary income and return of capital in equal proportions was a reasonable allocation.

The determination of the nature of a claim for damages is considered a question of fact. Carter's Estate, supra; 9 Mertens, Law of Federal Income Taxation (Rev.), Section 51.24. Therefore, unless a Tax Court finding that a given payment is ordinary income is clearly erroneous or arbitrary, its decision should be accepted on appeal. Phoenix Coal Co. v. Commissioner, 231 F. 2d 420 (C.A. 2d, 1956); Carter's Estate, supra.

II

THE TAX COURT CORRECTLY HELD THAT THE ENTIRE AMOUNT RECEIVED IN COMPROMISE SETTLEMENT OF THE CIVIL ACTION AGAINST THE UNITED STATES WAS TAXABLE AS ORDINARY INCOME

In order to decide whether the amount received in settlement of the Court of Claims case should be treated as ordinary income or as a return of capital, it is again necessary to determine the nature of the the claim made in the underlying action. Raytheon, supra; Carter's Estate, supra.

The Commissioner's conclusion as to the nature of the settlement payment is, of course, presumptively correct. Sager Glove Corp. v. Commissioner, 311 F. 2d 210 (C.A. 7th, 1962); Welch v. Helvering, 290 U.S. 111 (1933). If a taxpayer believes that the Commissioner's allocation to ordinary income is incorrect, he has the burden of showing that a different allocation is proper. Durkee v. Commissioner, 162 F. 2d 184 (C.A. 6th, 1947); Aluminum & Metal Service, Inc. v. Commissioner, 358 F. 2d 138 (C.A. 7th, 1966). "In order to carry * * * [his] burden of proof, petitioner must do more than merely claim alternative designations for what * * * [he] recovered--* * * [he] must prove a designation so that some orderly tax treatment may be accorded it." Sager Glove, supra, p. 211.

In the Court of Claims action taxpayer ASCo. sought damages of $14,956, of which $2,775 was clearly for lost profits. (I-R. 122.) After considering the other claims in the complaint and hearing testimony on December 7, 1964, as to alternative designations for the damages sought (Doc. No. 18), the Tax Court concluded that the entire amount sought was in lieu of lost profits. The only contrary evidence was the testimony of taxpayer Walter Thomson, and this testimony was not sufficient to carry his burden. (I-R. 128-129.)

CONCLUSION

For the reasons stated above, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
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Attorneys,
Department of Justice,
Washington, D.C. 20530.

December, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967

_____
Attorney

CASE #206-61 UNDER RULE 47-C

IN THE UNITED STATES COURT OF CLAIMS

W. Thomson, petitioner v. The United States, respondent

PETITION FOR REVIEW BY THE ENTIRE COURT

WITH

BILL OF EXCEPTIONS TO COMMISSIONERS REPORT

AND

BRIEF

Edwin L. Weisl Jr. - Assist. U.S. Attorney General
Herbert Pittle, Atty. - U.S. Dept. of Justice
for respondent

W. Thomson, petitioner in Pro Se
Jerrell Babb, as counsel
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IN THE UNITED STATES COURT OF CLAIMS

W. Thompson
Petitioner
v.
The United States
Respondent

Case #206-61

EXCEPTIONS TO REPORT OF COMMISSIONER

1. The report of the Commissioner is wrong on its face.

2. Said report is a misapprehension of the facts, and a misapplication of the law.

3. The report of the Commissioner does not conform to the mandate of the court filed March 18, 1966.

4. The hearing on March 8, 1967 did not conform to said mandate of the Court.

5. At said hearing Commissioner, over objection and motion to strike, admitted irrevelent, immaterial, and heresay testimony and extraneous matter by Robert A. Rowe, and refused to strike same in post trial proceedings. For details please refer to appendix F.

6. Commissioner cites no law to support his opinion and has none.

7. The inclusion of report of Case 206-61 under Rule 47(C) into the Report of Commissioner in Case 174-65 is contrary to previous rulings of the Court and prejudicial to petitioner.

8. There is no evidence in his report that Commissioner ever read or considered petitioners proposed findings of fact deated April 7, 1967, both of which are incorporated herein and

made a part hereof as if quoted verbatum.

9. Motion to strike direct examination of Robert A. Rowe was denied in error.

10. Motion to strike portions of defendants brief was denied in error.

Very respectfully submitted

W. Thompson, petitioner

Dated at Los Angeles,
California this_____
day of January 1968

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Respondent) CASE #206-61

BRIEF

PREAMBLE

The confusion and error, in the case herein, stems from the failure of Commissioners Stone and Bernhardt to recognize the fact that the government in its land acquisitions, employs three distinct classes of specialists in land appraisal work.

"Captive" class one and "independent" class two are employed exclusively by the "acquiring agency", herein the Navy, with the prime object and purpose of making appraisals and appraisal reports for the use of 'negotiators' maintained in parallel, to acquire desired properties by "negotiation".

Class three is employed exclusively by the Department of Justice for the prime object and purpose of attending court as "expert witnesses" in the trials, in proceedings in eminient domain, to acquire such parcels as the 'acquiring agency' is unable to acquire by 'negotiations". For details please refer to Appendix A.

AUTHORITY

Authority for this petition and brief is found in Rule 58 of the Court.

STATEMENT OF QUESTIONS RAISED

1. Was petitioners employment terminated on August 8, 1959? Report P2 L17: Appendix B.

2. Would petitioner have completed his employment had he finished his appraisal and filed his report on August 22, 1959? Report P2 L18 and 19: Appendix A paragraphs 6, 7, 8, and 9.

3. Can August 22, 1959 be construed as a constructive completion date of petitioners employment by respondent? Report P2 L30: Appendix A, paragraphs 6, 7, 8, and 9.

4. Were items 1, 2, and 3 above within the scope of Commissioners inquiry under the Courts decision of March 18, 1966? RT 3/8/67 P5: Appendix C.

5. Is Report Pg 2 paragraph 3 a misapplication of law? Appendix D.

6. Is Report Pg 2 paragraph 3 a misapprehension of the facts? Appendix E.

7. Did petitioners employment begin on June 2, 1959? RTp 3/8/67-P9 L21-26 to L1-P10. It began on June 1, 1959.

STATEMENT OF THE CASE

The only issue herein is: By what sum, if any, has defendant proved, the judgment of the Court filed March 18, 1966 ($7,125.00) should be offset by expenses saved by petitioner or sums petitioner did or could reasonably have earned during the period August 9 to September 5, 1959. For details please refer to Appendix G.

ARGUMENT

1. Petitioners employment by respondent was not terminated on August 8, 1959. Appendix B.

2. August 22, 1959 was not a "constructive completion date" of petitioners employment. Appendix C; Appendix A paragraphs 6, 7, 8, and 9.

3. Report page 2, paragraph 3 is a misapplication of the law. Appendix D.

4. Report is a misapprehension of the facts. Appendix E; Appendix A, paragraphs 6, 7, 8, and 9. Report page 2, paragraph 3 seeks, under Rule 47C, to alter a final judgment on grounds not provided in Rule 68 governing.

5. June 2, 1959 report P3L2 should be June 1, 1959. Report P2 paragraph 2 (L28-33).

7. Commissioner proved the "sole appropriate reduction" to be the amount of $120.00 Report P3L3to6. Defendant having failed to discharge its burden of proof as required by the mandate of the Court dated March 18, 1966. But, Commissioner having proved an appropriate reduction of $120.00 plaintiff is entitled to $7,125.00 less $120.00 or $7,005.00.

PRAYER

Wherefor petitioner prays the Court for the sum of $7,005.00 plus interest thereon, if allowable by law, or in lieu thereof a hearing before the entire Court on the merits and separate and distinct from hearing on any other matter petitioner may have before the Court.

Dated at Los Angeles,
California This_____
day of January 1968

_____
W. Thompson, petitioner

APPENDIX A

1. The confusion and error in the cause herein arises from the failure of Commissioners Stone and Bernhardt to recognize that the government in its land acquisitions employs three distinct classes of specialists in land appraisal work.

RT 3-11-63: P23L12; P75L20-23; P89L7; P90L2.

2. The acquiring agency, the Navy, as herein, the Corps of Engineers, as described by Mr. Robert A. Rowe, employs two classes of appraisers. The first class is "Captive" made up of salaried employees designated as "Staff Appraisers" such as Robert A. Rowe in 1959 R.T. 3-8-67 p38 L1 and 2. Said "Captive" appraisers are under the supervision and review of District Appraisers", as is Robert A. Rowe in 1967 R.T. 3-8-67 p37 L17 and said District Appraisers are under the supervision and review of "Regional Appraisers" as was Mr. Harper in 1959 R.T. 3-1163 P55 L21 and 22, and still is.

3. The second class is made up of "Independent Appraisers" employed by the acquiring agency as was Arnold Praekel and Roy Hanson employed by Mr. Harper in 1959. Defs 19.

4. The primary object and purpose of class one and class two appraisers is to make appraisals and appraisal reports for the use of "negotiators", maintained in parallel, who are employed to acquire desired properties by negotiations".

5. "Negotiations" are initiated on the reports of the first class of appraisers. When these "negotiations" bog down a second set of "negotiations" is undertaken on the reports of the second class of appraisers. When the second set of "negotiations" bog down the parcels remaining to be acquired are referred to the Department of Justice for proceedings in the Courts in eminent domain and the duty falls on the United States District Attorney. By that time appraisals and appraisal reports have been made "a nauseum" and said U.S. Attorney is in need of none. R.T. 3-11-63 P93 L17.

> "It was explained also to Mr. Thompson at this same conversation, that the Navy had already appraised all of these parcels of land by their own staff of appraisers and appraisers hired by the Navy Department and that many of the parcels were being acquired by the Navy on its own appraisals."

6. What said U.S. Attorney needs is an "expert witness" and where, as here, some ten million dollars at stake, said U.S. Attorney seeks out the very best and most highly qualified expert witness available to him offering the highest pay within his capabilities. R.T. 3-11-63 P25, 26, P27 L1 to 6; P29, 30, 31, P32, P33, P34, P35, P36, L17-22, P43 L3 to 4; R.T. 3-8-67 P5 L25, P6 L1 to 4. Defs 4 paragraph 2 P1 L6 to L12; Defs 25 P3 paragraph 2 and 3.

7. Said expert witness, on accepting employment as such, seeks to establish values that he feels able to sustain in Court and thereafter to employ whatever time is available to him to so clarify and refine his testimony as to attain the highest possible

degree of credibility. R.T. 3-11-65 P84 L2; R.T. P85 last line. Defs 1 P2 paragraph 2; Defs 19 P2 paragraph 2; Defs 22 P1 paragraph 2; L4 and 5.

3. The report of an expert witness is incidental to but is not the prime object and purpose of his employment. R.T. 3-8-67 P17 L13-24; R.T. P18 L24-26.

9. The duty of an expert witness does not cease upon the completion of his report but only upon the completion of the prime object and purpose of his employment. To wit: His attendance in Court as an expert witness. R.T. 3-8-67 P31 L15-18; L23-26; P32 L8-9; P33 L6 to 14;

Defs - 4 P1 paragraph 2; Defs 5, Defs 6, Defs 14, Defs 25 P3 paragraph 3.

10. From the above it is clear that goings on in the U.S. Corps of Engineers bears no relationship to an expert witness employed by the U.S. Department of Justice. R.T. 3-8-67 P66 L24-25

... Mr. Rowe: "I wouldn't even know what the Department of Justice is doing first hand." R.T. 3-8-67 P67 A. Mr. Rowe: "My answer is no for me testifying to anuthing the Department of Justice does."

APPENDIX B

1. That petitioners employment by respondent was terminated on August 8, 1959 (Report P2 L16-17) Defs 21

> "We wish to impress upon you that you should render no further services in connection with No. 1836ND and 1904ND until you have received written authorization." R.T. 3-8-67 P32 L4, P32 L25, :33 L6.

No inference can be drawn from the words above that respondent, at that time, intended to terminate petitioners employment and the only inference that can be drawn from the letter, as a whole, in that petitioner should refrain from further work until proval of petitioners employment was had from Washington.

Respondent had gone to great pains to seek petitioner out and had made no complaint or indicated in any manner that petitioner was anything but the "highly desireable" expert witness petitioner knew himself to be. R.T. 3-8-67 P32 L8-9; L15-16; P33 L6-14.

APPENDIX C

RT 3-8-67 P5 L7-12 Mr. Thomson: "Plaintiff believes that the burden of proof of any offsets to the total amount of $7,125.00 as found by the Court lies upon the defendant."

RT 3-8-67 P5 Mr. Pittle: "Then I will proceed with defendants position in the matter of offsets."

Appendix "A" paragraphs 5,6,7,8, and 9.

Petitioner believes that the intent of the Court in its mandate filed March 13, 1966 was not a trial de novo but to limit the inquiry under Rule 47C to such appropriate deductions as incidental expenses, travel espenses, and miscellaneous expenses which plaintiff earned or could have earned from others during the period August 9, 1959 to September 5, 1959.

There is no foundation in the record that on August 8, 1959 responder intended to "terminate" nor that petitioner considered himself terminated. Appendix B.

There is no foundation in the record that August 22, 1959 was a constructive completion date. RT 3-8-67 P17 L11 to 26; P18 L5 to 26; P19 L4 th 18; P20 L10 to 26; P30 L3 to 23 Appendix A paragraphs 6,7,8, and 9.

Defs 5, Defs 6, Defs 14 all authorize and approve petitioners employment as an "expert witness", the authorization and approval in Defs 14, here at issue being the sum of $7,125.00.

Preamble paragraphs 6,7,8, and 9.

Commissioner fell into error by his assumption that the prime

APPENDIX C

object and purpose of petitioners employment was to make an appraisal and prepare a report.

Since the prime object and purpose of petitioners employment was to attend Court as an expert witness for respondent in trials to begin early in September 1959 Commissioners report is wrong on its face.

APPENDIX D

Report P2 paragraph 3 is a misapplication of the law.

"If some substantive portion of a government drawn contract is fairly susceptible of a certain construction and contractor actually and reasonably so construed it that is the interpretation which will be adopted unless parties intention in otherwise affirmatively." Blount Bros. Const. Co. v. U.S. Ct. Cl. 1953-346 F2d 962.

"So though a contract of employment contains no other express promise of the employer to employ than to pay a stipulated compensation there is an implied promise to employ which is violated by refusal to allow the employee to perform his duties as such." Williston on Contracts Sec 1293 P3684 Vol 5. Flour Mills of America v. U.S. Ct. Cl. 7-747-72FS 603

"The rule is that a contract is to be construed most strongly against the party who prepares it (in this case the respondent letter of February 3, 1959) and it applies to the United States." "Garrison v. U.S. 7 Wall 688; U.S. v. Newport News 178 F 194; Blount Bros. Const. v. U.S. Supra."

APPENDIX F

Report P2 paragraph 3 is a misapprehension of the facts.

> "where an appraiser contracts with the government to perform specified appraisal services for an estimated period of time."

Petitioner in the matter here at issue did not contract with the government to perform as Commissioner states. Read four square with Mr. Weisers cover letter of February 3, 1959 and petitioners cover letter to Weiser dated May 2, 1959 and in conjunction with. Defs 14, Request and authorization to incur expense, it is clear that respondent employed petitioner to testify in court as an expert witness for respondent. Any appraisal or appraisal report would be incidental.

Defs 14 - Authority is hereby requested to incur the expenses described here below:

> "Services as an expert witness of Waldemar Thomson in connection with appraisals of parcels in 1836ND and in appraisal of easement and restrictions in 1904ND. You are authorized to incur the above mentioned expense. Date July 10, 1959."

Defs 13 - P1 paragraph 3:

> "Judge Pierson Hall, U.S. District Judge, to whom these matters are presently assigned has been pressing this office for trial dates within the near future."

APPENDIX F

Over petitioners vigorous objections and motions to strike respondent was allowed to introduce a lot of irrevelent, immaterial, irresponsible hearsay testimony and lengthy disertations by Robert A. Rowe, who in 1959 was a "staff appraiser" for the U.S. Corps of Engineers. Post trial motion to strike was denied. RT 3-8-67 P37 to 56.

The vice of such testimony is that no matter how hard the Commissioner might strive, the human mind is such that the Commissioner could not expunge it from his mind.

On cross examination Mr. Rowe admitted that the Corps of Engineers did not offer to employ petitioner during the period August - September 1959. RT P56 L13 to L25 - 3-8-67.

On further cross examination Mr. Rowe testified: RT P58 L1 3-8-67:

> "I think there is possibly a little misconception here. We do not hire <u>anyone</u> to be paid on Justice Department funds."

In other words the Corps of Engineers hires only "appraisers to make appraisals" and does not hire any "expert witnesses".

RT P66 L24 A Mr. Rowe:

> "I wouldn't even know what the Justice Department is doing first hand."

Q. Mr. Bubb: L26
"You don't know do you?"

A. RT P67 L. Mr. Rowe:
"My answer is no for me testifying to <u>anything</u> the Justice Department does."

A. RT P67 L12 A. Mr. Rowe:
"I wouldn't know anything that I could state for myself on the Justice department rates."

IN THE UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

alter Thomson and Ione Thomson

Petitioners

v.

ommissioner of Internal Revenue

Respondent

---

rustees of Aero Sales Co - Dissolved

Petitioners

v.

ommissioner of Internal Revenue

Respondent

N PETITION FOR REVIEW OF THE DECISIONS OF THE T.X COURT OF

THE UNITED STATES

APPELLANTS REPLY BRIEF

Walter Thomson
En Pro Se
FOR PETITIONERS
605 S. Normandie Ave.
Los Angeles, Ca. 90005

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TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

22109 - 22109A

lter Thomson, et ux

Petitioner

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ommissioners of Internal Revenue

Respondent

PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT

THE UNITED STATES

TCM 1965 - 237 - AS TO TC 1337-63:1340-63

PPELLANTS REPLY BRIEF

---

ummary of Appellants Reply to Respondents Brief:

FOOTNOTE 1: RESP BRIEF, PG 2, IS UNTRUE.

FOOTNOTE 3: RESP. BRF, PG 9, LNS 1 AND 2: Comm is not Congress. Single event occurrences, as herein, are exceptions.

FOOTNOTE 3: RESP BRF PG 9, LNS 3 - 6: The Courts have uniformly over-ruled upset of long established admin practise.

RESP BRF PG 9, PARA 3: A Supreme Court decision upsetting long established case law is a change in the law.

ALL SETTLEMENTS RECITED IN RESP. Argument II, PGS 8-10 resulted in "accessions to wealth clearly realized". Only one case, Telefilm was tried to jury as was Aero v. Columbia.

SETTLEMENT HEREIN fell $125,313.45 short of $173,500. loss "clearly realized" from same acts resulting in $47,686.55 settlement.

RESP BRF, PG 6, PARA 1: is taken from "evidence" excluded at the trial "leaving Commrs case standing on one leg".

COMMR AUTOMATICALLY, without more, taxed $1,132. to Aero Sales Co solely because receipt resulted from a "settlement" Attempted 11th hour "cure" stands on one leg and is reflected by testimony of taxpayer.

STATEMENT OF APPELLANTS REPLY

FOOTNOTE 1: RESP. BRF., PG 2: IS UNTRUE. Appellant objected to taxation of "legal fiction" dividends in TC 1340-63, pg 1, para. 5, item "C" and again in TC 1340-63, Pg 4, Para. 6, item 4. Appellants opening brf. Appen "B", Pg 13

Stout v. Commr 273 F2d 345 (4th Cir. 12/29/59)

Penn v. Robertson 115 F2d 167, 174

ellant advanced 1955 loss on Aero Sales Co. stock; in TC 1340-63,
2, para 6, item 2. Matter was excusable overlooked at trial in
fusion resulting from "hurry-up" orders of trial court; again
anced in Doc. 25; again in Doc 26, and finally by motion, oral
written, on Sept 14, 1966. Appellants Brf. Appen "B", PG 12.
d loss is properly before the Ninth Circuit Court inequity.

Slater v. Commr 356 F2d 668, 670

Knight Newspapers v. Commr 143 F2d 1007

Collins v. Commr 32 F2d 753, 754

FOOTNOTE 3: LNS 1 and 2, RESP BRF., PG 9: The "single event occurrence" was completed in Mar 1955 in reliance upon law long well established by uniform decision of the Courts appellants opening brf., appen. "B", pgs 1-5.

Obear Nester Glass Co. v. Commr 20 TC 1102, 1109

"To tax a single event occurence (over which tax payer had no control) after it happened is shocking".

1 Mertens Law Fed. Tax Oct 1967, Supp Sec. 4.14, footnote 33.3

Prather v. Commr 322 F2d 931 (CCA 9th, 1963, pg 935, footnote 2.)

Cohan v. Commr 39 F2d 540, 545 (10)(11), Col. 1, para 2, lns 1-18; Col. 2, para 1, lns 19-23

appellants receipt of $47,636.55 in Mar 1955 was a "single event occurrence". Under law, then well established by uniform Court

decision over two decades, 2/3 of said $47,685.55 or $31,791.03 was non-taxable in lieu of punitive damages.

FOOTNOTE 3: LNS 3 TO 6, RESP BRF., PG 9. The courts have uniformly over-ruled retrospective taxation by upset of long established admin. practice.

CIR v. Monarch Life 114 F2d 314 (CCA 1940)

Helvering v. RJ Reynolds 306 US 110

Kress v. US 159 FS 338

RESP BRIEF, PG 9, PARA 3: A Supreme Court decision, upsetting long established case law is a change in the law. Appellants opening Brief, Appendix "B", Pg 3.

109 U of Pa. Law Rev 74; Judge Story in Prop of Gospel v. Wheeler 2 Gall. 105, 139; Gray - Limitation of Taxation 1906

Sec. 1826; Bowie v. Columbia 373; Bass Ratcliffe & Gretton v. State Tax 266 US 271, 280, 284

ALL SETTLEMENTS RECITED IN RESP. ARGUMENT II, PG 9-10, RESULTED IN "ACCESSIONS TO WEALTH, CLEARLY REALIZED", either as recovery of profits or recovery of capitial gains in "excess of the basis" Only one case was tried to jury prior to settlement. Telefilm Inc v. Comm 21 TC 683 (1954). In telefilm, the Tax Court lead "jury award to be most reasonable basis".

SETTLEMENT HEREIN FELL $125,[illegible]13.45 SHORT OF $173,500. LOSS. "CLEARLY REALIZED" FROM SAME ACTS RESULTING IN $47,[illegible]36.55 RECEIPT. Appellants opening brf, append "B", pgs 6 to 11.

Michelsen v. Neb Tire 63 F2d 597, 601 (8th Cir)

H. Liebes & Co v. Commr 90 F2d 932, 935 (9th Cir 6/14/37)

"RECOVERY FOR INJURY TO CAPITAL IS NEVER INCOME"

Said recovery was after trial to jury wherein NO testimony as to loss of profits WAS ALLOWED. Appellants opn brf pgs 6 to 8.

Telefilm Inc v. Commr 21 TC 6[illegible], 694 (1954) and 1/3 of $47,6[illegible].55 or $15,395.52 was clearly return of capital.

RESPS BRF, PG 6, PARA 1: is taken from "EVIDENCE EXCLUDED AT TRIAL" leaving respondents argument II, standing on one leg. Appellants opn brf, append "D", pg 6, RT pg 106, ln 4.

COMMR AUTOMATICALLY, WITHOUT MORE, TAXED $1,1[illegible]2. TO AERO SALES IN 1954, SOLELY because receipt resulted from a settlement.

Stout v. Commr 273 F2d 345, 350 (4th Cir. 12/29/59)

Manchester Paper Box Co v. Commr [illegible]9 F2d 315

tempted 11th hour "cure" stands on one leg, is incompetent and pure speculation 16 years after the event. Appell. opn brf. appen "D", pg 5, ln 15 to pg 6, lns 8 and 9, lns 13. RT pg 106, ln 4.

and is reflected by taxpayer who handled the transaction. Appel opn brf. append "D" pg 6 & 7. RT pg 99, ln 20 to ln [illegible], pg 100, RT pg 101, ln 4 to ln 7.

HSD Co v. Kavanagh 191 F2d [illegible]31, (3), 939

PROOF OF SERVICE

LLIAM HERMANSEN, declare under penalty of perjury that
e served respondent herein, by enclosing three copies
f (centerfolded) in a sealed envelope addressed to the
able Mitchel Rogorin, Asst. U.S. Attorney General, Tax,
Department of Justice, Washington, D.C., and deposited
into the United States Mails, postage fully paid, on
ARY 14, 1963.

WILLIAM HERMANSEN

CASE #174-65

W. Thomson, petitioner

v.

The United States, respondent

EXCEPTIONS TO REPORT OF COMMISSIONER

BRIEF

Honorable Edwin L. Weisl, Jr.
Asst. U.S. Attorney General
Mr. Herbert Pittle, Attorney
for respondent

W. Thomson - Petitioner
in Pro Se

Prepared by
W. Thomson
605 S. Normandie Ave.
Los Angeles, Ca.
90005

CASE #174-65

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IN THE UNITED STATES COURT OF CLAIMS

W. Thompson
Petitioner
v.
The United States
Respondent

Case #174-65
Motion for permission to file supplemental Exceptions and Brief

Petitioner respectfully moves the Court for permission to file supplementals to petitioners Exceptions and Brief and advances to the Court the following reasons:

1. Petitioner has available to him only a part-time stenographer capable of preparing said papers.

2. Said part-time stenographer has been and still is fully occupied with year end papers for his regular employer.

3. Petitioner has been on trial in Court as an expert witness almost continuously since October 1, 1967 (and still is) and has been able to devote only his after hours to the preparation of said brief and exceptions.

4. Report of Commissioner is so replete with misapprehension of fact and law and misapplication of law that the preparation of appropriate exceptions and brief has been and is a monumental task.

5. The Court has ruled that petitioners exceptions and brief must be filled by January 23, 1968 and the exceptions and brief herein are the best that petitioner can present by said date.

6. In the hope that petitioner be allowed to file supplemental exceptions and brief, petitioner is forwarding to the Court six copies of his preliminary exceptions and brief (two for Honorable Edwin L. Weisl) retaining 25 copies of each which will be incorporated into and made a part of petitioners complete brief and exceptions if supplemental filing is allowed.

Very respectfully submitted

Dated at Los Angeles, California this _____ day of January 1968

W. Thompson - petitioner

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson
Petitioner
v.
The United States
Defendant

Case #174-65
Exceptions to Report
of Commissioner

1. Commissioners Report is wrong on its face.

2. Said report is replete with misapprehension of the facts and of the law.

3. Said report is replete with misapplication of the law.

4. Said report is replete with misstatements of the facts.

5. Said report construes contracts most favorably in favor of the maker contrary to ruling case law.

6. Said report fails to apprehend or consider the wrongdoing of agents of the defendant and the innocence of plaintiff.

7. Said report is replete with consideration of irrelevant, immaterial and hearsay material.

8. Said report seeks to penalize plaintiff for the wrongdoing of agents of defendant.

9. Said report cites no authorities and ignores the authorities cited by Judge Davis on page 13.

Very respectfully submitted

Dated at Los Angeles, California this_____ day of January 1968

W. Thompson - petitioner

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Respondent)

Case #174-65

Brief

PREAMBLE

Petitioner will demonstrate to the Court:

That report of Commissioner herein is misapprehension of the facts and the law and misapplication of the law so fundamental as to throw said report into doubt. Appendix A-A and B-B.

That report demonstrates such inattention to petitioners pleadings of law and fact as to violate the protection guaranteed petitioner under the 5th Amendment to the Constitution. Appendix C-C.

JURISDICTION

Jurisdiction is conferred upon the Court by Title 28 USCA Sec 1491 and Title 41 USCA Sec 5 et seq. This petition is brought under Rule 58.

INCORPORATION

Petitioner refers to his first amended complaint filed "to conform to the proof," to exceptions to Report of Commissioner and to the documents enumerated in appendix C and by reference thereto incorporates same herein and makes same a part hereof as if set forth at length. Appendix C-C.

QUESTIONS RAISED

I

Were not the rights of plaintiff, as a government contractor, iolated contrary to the protection afforded plaintiff by the ue process clause of the 5th Amendment to the Constitution. ynch v. US 292 US571

II

Does not the Court of Claims have equitable jurisdiction o the extent of reforming contracts and of basing its decree pon contracts so reformed.
utcliff Stge. & Whse. Co. v. US 125 Ct. Cl. 297; 112 F.S570

III

May not a suit subsequent be brought upon the implied rovisions of contracts previously established as express con-racts. Restatement of Judgments Sec 62b P256 para 2.

IV

Is not defendant stopped from invoking the doctrine of Res udicata.
estatement of Judgments Sec 62b P256 para 2; White v. Alder 89 NY 34 - 43N E2d 798; Res Judicata 65 Harva Law Rev 830 75 to 78)

V

In inducing plaintiff to make an unduly low bid in price erdiem did not agents of defendant make a misrepresentation of

a material fact and is not said misstatement grounds for refor-
mation of the contract. Appendix B-B. For law see Appendix E-E.

VI

In inducing plaintiff to make an unduly low bid in days of performance did not agents of defendant conceal from plaintiff and remain silent as to material facts known to them but unknown to plaintiff and is not said concealment and silence grounds for reformation of the contract. For law see Appendix E-E.

VII

In inducing plaintiff to bid did agents of defendant intend to award plaintiff a 3rd contract to testify as to mineral values and did plaintiff so understand. (Defs. 2' P2) And did from these acts arise a 3rd contract implied in fact. Rivers v. Beadle 183 Cal app. 2d 691.

VIII

Under the law of the place of performance did the three contracts constitute one single contract with provisions express and inplied. For law see appendix E-E.

IX

Is the scope of authority and the range of duties of an independent expert witness to do all of the things he usually does as such and comparable to that of a lawyer. Kast v. Miller & Lux 115 Pac 932; Vadner v. Rosella 45 Pac 2d 561.

X

Must not the three contracts between plaintiff and defendant be construed most strongly against defendant the maker. See App. E-E.

XI

Was not the prime object and purpose of plaintiffs employment and the intention of the government that plaintiff should attend pretrial conferences and trials as defendants expert witness in Cases 1836ND and 1904ND; did not plaintiff so understand and conduct himself and did not a contract implied in fact arise from said purposes, intentions and conduct obligating both parties to see to it that said purpose and intentions were effactuated. For law see Appendix E-E.

XII

Was not there a clearly enforceable obligation upon plaintiff to attend all pretrial conferences and all trials as an expert witness for defendant in Cases 1836ND and 1904ND. For law see Appendix E-E.

XIII

Since there was said enforceable obligation upon plaintiff to attend all pretrial conferences and all trials as defendants expert witness in Cases 1836ND and 1904ND was there not an enforceable obligation on defendant to call plaintiff to said conferences and trials.

Flour Mills of America v. US Ct. Cl. 7-7-47 72 FS603

XIV

And since defendant employed plaintiff to attend all pretrial conferences and court trials as defendants expert

witness in Cases 1836ND and 1904ND was there not a promise by defendant, emplied in fact, to so employ plaintiff.

Williston on Contracts Sec 1293 P3684 Vol 5.

XV

Would it not indeed be a strange doctrine that an innocent party to a contract is bound to rescind it upon any breach by the other party.

Snare and Triest v. US 43 Ct. Cl. 364, 367

XVI

Is it not impossible under the decisions cited by Judge Davis on Page 13 to construe Defs 21 to be a termination of petitioners employment by defendant.

STATEMENT OF THE CASE

On January 6, 1959 two contracts of employment of plaintiff by defendant were initiated. Said contracts were implemented by bids Defs 3 and Defs 8 approved respectively on February 19, 1959 and July 10, 1959.

Defendant devied Defs 8 and plaintiff sued. In decision, by Judge Davis, filed March 18, 1967, the Court established Defs 8 as a contract and awarded plaintiff $7,125.00, "less appropriate deductions", upon the face of said bid Defs 8 but did no more.

Plaintiff, in Case 174-65 asks reformation of said established contracts on the following grounds:

1. That the contracting officer induced plaintiff to bid $75.00 per day instead of plaintiffs usual fee of $125.00 per day by telling plaintiff that the highest per diem rate he was authorized to pay was $75.00 per day. On this statement petitioner had a right to rely and did rely in making his bid. As shown in letter dated April 29, 1958 from attorney general to U.S. Attorney said representation was in 1959 untrue. Said letter was "discovered" by plaintiff in January 1967.

2. That the contracting officer induced plaintiff to bid 155 days by withholding from plaintiff that 5 months prior he had awarded Mr. Miles a contract for 165 days to prepare himself for trial of the identical 50 parcels of property. Plaintiff in preparing his bid had a right to this information from said officer. Had said information been furnished to plaintiff, plaintiff would have bid 168 days instead of 155 days. But said information was revealed to plaintiff for the first time on March 11, 1963.

3. That contracting officer told plaintiff in Defs 2 that plaintiff would be awarded an additional contract to prepare himself for trial of Mineral parcels which Mr. Miles was not qualified to do and which work was not included in the 165 days awarded to Mr. Miles. Plaintiff had a right to rely on this statement and did. Said contracting officer never forwarded to plaintiff any bid form or said third contract although he

knew plaintiff was performing said services. Instead he awarded a contract to one Moody for 10 days at $135.00 per day to perform only a small part of the services for which he had previously employed petitioner.

4. That in Defs 3 and Defs 8 the contracting officer stated expressly that plaintiff would be expected to attend all pretrial conferences and court trials as his expert witness in Cases 1836ND and 1904ND and on this statement plaintiff had every right to rely and did. Mr. Miles was called to said pretrial conferences and trials for a total of 133 days. It is reasonable to presume that plaintiff was denied at least 85 days at $125.00 per day by the conduct of the contracting officer and defendant.

ARGUMENT

It would be difficult to find an instance of more flagrant disregard, by Federal Officers, of common decency and of the rights of a government contractor than that which is evidenced herein.

A desireable expert witness was needed for a multi-million dollar lawsuit and much trouble was gone through to seek out the right man. When he was finally located he was lied to and relevant facts were hidden from him when he was asked to prepare a bid for services. He was informed that he was to testify as to mineral values but no bid for such services form was ever sent to him, although said officers knew that

contractor was performing said services. After several months of performance by contractor said Federal Officers decided to get rid of him. No complaint was ever made of contractor's character, ability, or performance. Nor was contractor ever informed that his services were no longer desired. All that was done was to fail to notify contractor of approval of attorney general and then write contractor to stop work until said approval was had. Contractor was not dismissed nor was dismissed ever suggested. Contractor was given no occasion to believe other than he would be called to pretrial conferences and trial as defendants expert witness.

Mr. Harper and staff; Mr. Leon O'Conner and staff; Mr. Fred Praekel and Mr. Ray Hanson had made numerous appraisal reports and defendant needed no more. 50 large parcels and the minerals had been referred to the U.S. Attorney for proceedings in Eminent Domain. Said attorney needed a good expert witness to whom an appraisal report was purely incidental to his testimony in Court.

Contracts established by bids Defs 3 and Defs 8 will not bear litteral interpretation nor do contracts bids Defs 3 and Defs 8 effectuate the avowed intention of defendant to have plaintiff testify as to the values of the minerals.

Without misrepresentation and with full disclosure by officers of defendant, plaintiff would have bid 168 days to

prepare himself for trial of the 50 parcels in 1836ND and 1904ND plus 20 days for the minerals or a total of 188 days, at $125.00 per day, or a total of $22,500.00 instead of the $11,625.00 he did bid.

The presumption, based upon his policy statement in letter dated April 29, 1958, is that the attorney general would have approved plaintiffs bid for said $22,500.00.

For the attorney general, on January 31, 1958, approved $15,000.00 each to Bernard Evans and Lawrence Sando to prepare themselves for trial in the Casitas Dam Case where deposit with declaration of taking was $2,489,384 or 2/3 of the deposit of $3,561,642 with declaration of taking, in Lemoore Case. File 33-5-1919-0 January 31,1958 - 1396 and 1397.

The law of the place of performance of the contract prevails. Fairbanks Morse v. Consol. Fisheries 190 F2d 817.

Said law states that two or more contracts between the same parties upon the same subject matter, even though separately executed, constitute one contract. Lynch v. Bank of America 2 Cal app 2d 214.

Said law further states that the authority and duties of an expert witness are to do the things he usually does as such and are comparable to those of a lawyer. Kast v. Miller and Lux 115 Pac 932; Vadner v. Roselle 45 Pac 2d 561.

and the law is that a contract will be construed most strongly against the maker, defendant herein. Lynch v. US 292 US571.

Viewed four square the contract of employment between plaintiff and defendant contains provisions implied in fact, which entitle plaintiff to a reformation of said contract of employment. The court has equitable jurisdiction to reform contracts as set out in Sutcliffe Stge & Whse Co. v. US125 Ct. Cl. 297; 112 FS570.

Subsequent suit may be brought upon said implied provisions as set out in Restatement of Judgments Sec 62B P256 Para.2.

Defendant is estopped from invoking the doctrine of Resa Judicata by its own misrepresentation and concealment and by its conduct at the trial on March 11, 1963.

Restatement of Judgments Sec 62b P256 Para 2

Res Judicata Harv Law Rev 830 (75 to 78)

There was an obligation, express in Defs 3 and 8, and implied by custom and usage enforceable upon plaintiff, to be ready and to attend all pretrial conferences and all trials as an expert witness in cases 1836ND and 1904ND.

Williston on Contracts Sec 1293 P3691 Vol 5

Hostetter v. Park 137 US 30

Said enforceable obligation upon plaintiff created an equally enforceable obligation upon defendant to call plaintiff

to attend all pretrial conferences and all trials as an expert witness in Cases 1836ND and 1904ND.

Flour Mills of America v. US Ct. Cl. 7-7-47; 72 FS603.

Defendant paid Miles for 127 days at $75.00 per day on 36 parcels of fee in 1836ND and 38 days at $100.00 a day on 14 parcels of flight easements in 1904ND for preparation for trial; plus 113 days at $100.00 a day for attendance at pretrial conferences and trials. Miles perfromed at place of his office.

Plaintiff is entitled to a reformation of contracts Defs 3 and Defs 8 from 155 days to 168 days and from $75.00 per day to $125.00 per day, for preparation for trial of said 36 parcels in 1836ND and 14 parcels in 1904ND. Plaintiff is entitled to payment for 20 days at $125.00 per day on the minerals under a contract implied in fact. Miles was not qualified to testify as to the mineral values and said minerals were excluded from his contract for 165 days.

Plaintiff is entitled to 85 days at $125.00 per day for attendance at pretrial conferences and trials as an expert witness in Cases 1836ND and 1904ND, the amount of which he was deprived by defendants failure to meet its obligations to plaintiff.

Failure of the contracting agent to meet his obligation to call petitioner to attend pretrial conferences and trials in Cases 1836ND and 1904ND was the first such instance in plaintiffs

areer extending over a period of almost 40 years, was an nusual occurrence, was known in plaintiffs professional circles; nd presumed in such circles to be for cause and therrfore amaging to plaintiffs reputation as an expert witness. A onsequential injury which the contracting officer could easonably forsee.

O'Dell v. Crossand Shaver 14 SE2d 767; 5 Corben Contracts ec 1095 P519.

Said contracting officer even went farther and maligned laintiff to the US Attorney General (Defs 25) and later to ommissioner of Corporations State of California. (Letter of une 4, 1962 from U.S. Attorney to Allen Hurwitz). It would e difficult to estimate the damage and mischief that the ontracting officer has done to plaintiffs reputation as an xpert witness, but to an expert witness whose daily fees are 125.00 per day the damage is surely in excess of $12,500.00.

CONCLUSION

. Plaintiff is entitled to reformation of contracts Defs 3 nd Defs 8 from $75.00 per day to $125.00 per day.

. Plaintiff is entitled to reformation of contracts Defs 3 nd Defs 8 from 155 days to 168 days.

. Plaintiff is entitled to a contract implied in fact for 0 days at $125.00 per day for preparation for trial as an xpert witness as to mineral values.

. Plaintiff is entitled to a contract express in Defs 3
nd Defs 8 and implied in fact for 85 days at $125.00 per day
or attendance at pretrial conferences and trials in cases
336ND and 1904ND.

. Plaintiff is entitled to at least $12,500.00 as conse-
uential damage to plaintiffs reputation as an expert witness.

. Judgment herein to be reduced by $4,500.00 paid plus amount
f judgment in 206-61.

ated at Los Angeles,
alifornia this
ay of January 1968

Very respectfully submitted

W. Thompson

APPENDIX A-A

BASIC MISAPPREHENSIONS OF COMMISSIONER

APPENDIX A-A

NDAMENTAL MISAPPREHENSION OF FACT

mber one is found in footnote 6 of pg 9 of report.

0 days from date of approval of second contract on July 10, 1959 December 7, 1959, 98 days after September 1, 1959. An offered livery date, 98 days later than the date of need for said app-isal is an absurdity.

id absurdity stems from Commissioners misapprehension and sinterpretation of the first contract. RT pg 6 lns 10 to 12.

> "In which he agreed to perform the appraisal services in C.A.-1836 ND for an estimated 60 days".

> "Language, though plain and clear will not bear litteral interpretation if this leads to an absurd result", Williston on Contracts. Sec. 610 P533, Vol. 4.

t if said, "First Contract". is a "Letter Contract". pursuant Federal Procurement Regulations, Sec. 1:3:405(b), then the econd contract" conforms to the mandate in said, F.P.R.

> "A letter contract shall be superceded by a definitive contract at the earliest possible time".

d when on February 3, 1959, Mr. Weiser inserted the 150 days said second contract, it was natural for him to assume that titioner would execute same in 30 days; that approval of the torney General would be had in another 30 days; and the date "offered delivery" would fall on September 1, 1955, the date the anticipated need for said report.

. 3-8-67 Pg 37 ln 16A: Mr. Thomson:

"You have to understand that at the time that Mr. Weiser submitted the bid to me, I understood it that it was 60 days to get me started. I had never seen the property before".

nber two is found in footnote 9 pg 13 lns 6 to 8 of report.

"There is no explanation in the second for the increase of Mr. Miles contract rate from $75 .00 to $100.00 per day".

id "increase" arose from a basic change of policy of the US

:onery General effective April 29, 1958, 8 months prior to

:itioners employment. See MEMO ANM:dc 4/29/58-RJL-CMACM

-5-1668-698 and 1D34 a document respondent failed to produce,

ordered, on 3/8/67.

ease see File 33-5-1919-0-1/31/1958, Form 25 B. Bernard Evans

896 and Laurence Sando, Form 25B-1397, both of which documents

spondent failed to produce, as ordered on 3-8-1967.

the same year, 1958, said US Attorney and US Attorney General

:ablsihed a policy of paying $25.00 to $50.00 per day additional

mpensation to cover travel and subsistence for services performed

:side of the point of residence of their expert witnesses.

:fs 4; 3-8-67 SK-NP

nber three is found in footnote 7 pg 10 and footnote 10, pg 14.

e pre-trial record between July 1966 and February 1967 clearly

monstrates the obstructionist tactics and down-right disobedience

respondent in effort to prevent any discovery and respondents

ilure on March 8, 1967 to produce more than a fraction of the

tinent documents in defendants possesion. Commr seeks to
ow respondent to profit from its non wrong doing contary to
g established rule.

ANM:dc

Attorney General, Lands Division, 4/29/58
Land Acquisition Section
Laughlin E. Waters, U. S. Attorney, So. Dist. of Calif.
Albert N. Minton, Asst. U. S. Atty. (Lands)
Civil No. 1286-ND, Tract F-1145, and Civil No. 1449-ND,
Tracts F-1103, F-1106, J-1450, K-1548 and K-1577
(Your references: RJL-CMacM 33-5-1668-698 and -1034)

Reference is made to letter, dated March 31, 1958, in connection with the above-referenced condemnation proceedings, wherein this office was requested to submit a new Form 25B and voucher for the Department's consideration, covering the services rendered in the above matters by Mr. W. A. Savage.

The oversight of the Department's requirements in not getting prior approval for this employment is regretted, and assurance is given that, so far as it is possible to prevent it, no future happening of the kind will occur.

In regard to the per diem rate asked by Mr. Savage, it should be taken into consideration that Mr. Savage is one of the most experienced appraisers and satisfactory witnesses now being employed through this office. Prior to the first of the year, Mr. McPherson, who was then in charge of the Lands Division, communicated with the Department and stated that, if it were going to be possible to retain on the list of witnesses men of the standing of Mr. Savage and certain others, it would be necessary to establish their per diem rate at the sum of $100. These men are now being paid at this rate, and above, by the State of California, the counties, and other local entities, and it is not to be expected that they will work for the government at a lesser rate when they can secure all of the employment they wish from these other agencies at the rate of $100 per day.

It is the understanding of this office that Mr. McPherson took this matter up personally with Mr. Luttrell, and received his approval of establishing the higher rate, before Mr. Savage submitted his bill and this office submitted its Form 25B. It should be noted that the per diem rate of $100 has already been approved for Mr. Savage in other cases, and for Mr. Nathan Libott and Mr. Joseph Shlichta.

33-5-1668-1034

NDAMENTAL MISAPPREHENSION AND MISAPPLICATION OF THE LAW IS FOUND

FOOTNOTE 4, PG 3 OF REPORT.

itioners original petition in Case 206-61 prayed for #7125 under
"second contract". Respondent answered denying a contract.
oof on 3-11-63 was limitied to the existance or non-existance of
d contract.
court, on 3-18-66, established the contract and declared
pondent liable and awarded petitioner judgement for the face
reof $7125 (less appropriate off-sets of amounts "saved" by
itioner or which petitioner earned or could have earned between
ust 8, 1959 and September 6, 1959).
judicita is established only as to the availability of
pondent for $7125. (less $120.) Moores Federal Practice Sec.410(2)

"And in addition, qualification of the general rule against splitting may be warranted by the defendants conduct (21) and by exceptional circumstances (22)".

) White v. Adler (1942) 289 NY 34; 43 NE 2d 798, 142 ALR 898

) Restatement of Judgements Sec. 62(b), pg 256, para 2.

"Where the defendants fraud or mis-representation a concealment prevented the plaintiff from presenting his entire claim".

Judicata 65 Harvard Law., Rev 818

"But there are recent decisions allowing successive suits on theories of express and implied contracts". (49).

) Harries v. Whitworth 211 SW 2-101

"The conduct of defendant in concealing facts (75)".

5)Hyete v. Smith 272 NW 747
White v. Miley 241 PAC 670
Albaugh v. Orborne-Mc Millan 205 NW 5

"Or in preventing joinder of the issues at the previous trial (76)".

6) "Limited Bank and TrCo 2 Hunt 18 Calapp 2-112

Couch v. Couch 22 SO 2 ND 599

"Has been lead to constitute a waivure on est oppel".

"In other cases a justifcable ignorance of the facts (77)" or the law (78).

7)"Buck v. Buck 184 SW 2-68
Szombathy v. Merz 148 SW 1028

"By the plaintiff has led to the allowance of a second action".

8) White v. Adler 43 NE 2d 798
Holland v. Spear & Co., 83 NYS 2-21

"Some courts have expanded these principles into a broader policy by making exception to the rules of merger or bar where ever justice requires". (79)

Smith v. Penner 201 Pg 2d-1948
Greenfield v. Mater 194 Pg 2-1
Monagas v. Vidal 170 F2d 90 cert den 335 WS 911

"That which has not been tried, cannot have been adjudicated that which is not within the issues presented cannot be concluded by the judgement".

Slaver v. Sharp County 34 SW 262

v. Pan American Pet 55 F2d-776

mwell v. County of Sacramento 94 US 351-356

rk v. Starr 94 US 477, 485, 486

ris v. Whitworth 211 SW 2-101

C.J.S. Judgements Sec 649 and Sec. 674

h v. Merchants and Planters Bank 66 SW 918

res, Federal Practise

. 0-405(1) Pg 632

"Under the second proposition the judgement prevents the parties from relitigating those matters that were determined".

(3) Cromwell v. County of Sac 94 US 351

. 0.405.12

"Res Judicata is a sound and salutory principle - But at times there is considerable truth in the observation that res judicata renders white, black, the crooked straight".

(2) Sec. 0.405(1)

itioners response to Respondents Brief dated July 2, 1967.

APPENDIX B-B

BASIC MISSTATEMENTS BY COMMISSIONER

APPENDIX B-B

SSTATEMENT: RT PG 3, lns 20 to 34:

April 29, 1958 respondent changed its policy and increased its
andard rate of pay for expert witnesses from $75.00 to $100.00
r day, ltr 4/29/58 ANM:dc:33-5-1668-1034. Appendix "A-A, relating
W.A. Savage and others. The type of property involved is a
gment of Mr. Pittles imagination. RT pg 42 lns 3 to 12.
ior to January 31, 1958 respondent again changed its policy and
ain increased its standard rate of pay for expert witnesses from
00.00 to $125.00 per day for services performed outside of place
residence of said expert witnesses: D.J. File 33-5-1919-01396
d 1396 Bernard C. Evans and Laurence Sando.
rm Lands acquired for the Casitas Dam. RT 3-8-67 pg 39 lns 9 to
, pg 41. Declarations of taking deposit for Casitas Dam "2,489,
4. for 1904 ND $154,259; for 1836 ND $3,407,383. total deposit
moore $3,561,642. or 148% of Casitas Dam deposit.
t Attorney Gen approved $15,000 each to Sando and Evans for
vestigation and preparation for trial of Casitas Case but only
1,625. to Thomson and $12,375. to Miles for investigations and
eparation for trial in the Lemoore Case inwhich deposit was
3% of deposit in the Casitas Dam Case. Miles fees were increased
$100. per day on March 21, 1959.
tfs 1 - 3-8-67. The Dept of Justice paid Praekel and Leroy
rnett $26,000. to appraise the Right-of-Way for a pipeline to

REQUEST AND AUTHORIZATION TO INCUR EXPENSE

SE #174-65

Department of Justice

Southern District of California

TO: THE ~~ADMINISTRATIVE~~ ASSISTANT ATTORNEY GENERAL, Washington, D.C.

Los Angeles, Calif., Jan.31,
(Place and date)

FROM: Joseph F. McPherson
(Name—please type)
Assistant U. S. Attorney
(Title)
(Signature)

DJ File No. 33-5-1919-0

RE: Casitas Dam and Reservoir (Ventura River Project)

REQUEST

Authority is hereby requested to incur the expense described below:

Services as an expert witness of Bernard G. Evans, Real Estate Appraiser, 389 Court Street, San Bernardino, California, in the appraisal of the following properties in the above project:

Civil No. 20,267-PH, Parcels 1 and 1A (easement)
20,577-PH, Parcels 1, 2 and 3
678-57-PH, Parcels 1, 2 and 3; 4, 5 and 6
736-57-PH, Parcels 1 and 2
877-57-PH, Parcels 1, 2, 3, 4, 5 and 6
974-57-PH (one parcel)
975-57-PH (one parcel)
1089-57-PH, Parcels 1 and 2

Appraisals of all of above - flat fee $15,000.00

Pretrial conferences and court appearances to be at rate of $100.00 per day. Declaration of taking deposits for above property total $2,489,384.00.

Estimated total expense: $ 15,000.00 Contract No.

JMcP:ANM:dc

NOTE.—Instructions on the reverse hereof must be complied with fully.

AUTHORIZATION

You are authorized to incur above-mentioned expense. Date APR 4 1958

The account should be prepared on Form 5-1/2 D. C., etc.

☐ Payment should be made by the U. S. Marshal for your district from the appropriation.

☒ Voucher should be forwarded to this office for payment from the appropriation.

33-5-1919-0

Recommendation for Approval: JVB:RJL

1580128 - Salaries & Expenses
General Legal Activities 1958
Dept. of Justice

Approved:

Henry D. Rogers
Administrative Assistant ~~Attorney General~~

1396 CS

STATEMENT: RT Pg lns 34 to 39:

U.S. Treasury sought out petitioner as an expert witness in
. Boswell & Co. v. Commr Docket 61846, 66655; 34 TC 539 affd.
9 302F2d 682 62-1 USTC, Pg 9430; cert denied 83 S. Ct 118, in-
ch TC accepted petitioners testimony in toto affmd Ninth Circuit.
property in question abutted Lemoore and in the "back yard" of
Miles. Yet the US Treasury was willing to pay petitioner
5. per day at the time Mr. Miles was working for Dept of Justice
$75. per day. Petitioner was employed by US Treasury in DEC 58.
S-12 Pg 6 ln 15 Edison Co. Case. Expert Witnesses: W.A. Savage,
nard Evans, and Waldemar Thomson.

S-25, Pg 3 lns 28 to 35:

"Among others, Mr. Holloway Jones recommended Mr. Thomson and on December 24, 1958, replied to the inquiry from this office as follows:"

"Mr. Thomson has appeared as an Evaluation witness for the State in numerous cases both in Southern Calif and in this area. I am happy to recommend him in every way".

ple of Calif. v. Eagle Rock Properties Inc. Laurence Sando and
ter Thomson, Expert Witnesses.

ple of Calif. v. Lita S. Hurd - Bernard Evans and Walter Thomson,
ert witnesses.

3-8-67 Pg 39, ln 26, Pg 4, ln 5, Pg 41

Q: Mr. Pittle: "Now who were--what appraisers were we paying more than $75. a day to make appraisals?.
A: Mr. Thomson: "The kind of appraisers who had been on cases with me."
Q: Mr. Pittle: "Who?"
A: Mr. Thomson: "Bernie Evans, Laurence Sando".

FS 4, Para 2, lns 5 to 12:

"A copy of Mr. Thomson's qualification is enclosed. Mr. Thomson appears to be <u>especially desirable</u> since he is qualified to render an opinion as to the fair market value of certain mineral interests. The other appraisers heretofore employed by the acquiring agency (Praekel and Hanson) and this office (Andrews and Miles) do not fulfill this qualification. Mr Thomson has been very highly recommended by the Calif. State Highway Dept for whom he has frequently worked".

FS-12, Pg 5, Para 2, ln 1:

"I am also a member of the American Institute of Mining Metallurgical and Petroluem Engineers".

ning Engineer Erich was paid $125. per day; Pg 12 and 13; Mining

gineer Moody was paid $125. per day; Pg 14; Mining Engineer Jensen

s paid $125. per day; Pg 15.

NCLUSION: RT Pg 3 lns 39 to 41; Pg 4, lns 1-3 IS A MISAPPREHENSION

FACT AND A MISAPPLICATION OF THE LAW.

4, ln 2:

"That offices concept of a fair price", is not before the court. What is before the court is the representation made to petitioner when petitioner was induced to make his bid of $75. per day, RT 3-11-63, Pg 26 lns 14 to 20: "And I told him that the State Dept of Highways customarily paid me $100. a day, except when I went out of the City of Los Angeles, when I was paid $125. per day. He said the government could not pay that much. He also said the highest wages they ever paid appraisers was $75. a day and that he would recommend I be employed on that basis".

th Mr. Minton and Mr. Weiser were in the hearing room at the time

at respondent, Mr. Minton and Mr. Weiser, did not dare prejury

the extent of denying said testimony.

3-8-67, Pg 21 lns 16 to 26; Pg 22 ln 1-4:

"And that they had been paying me $125. a day outside of LA or San Fran and the U.S. Treasury was paying me $125. a day for the work I was doing in this area. (J.G. Boswell v. Commr Supra) Mr. Minton replied that he could not pay that much - and that he would pay me the highest rate he was authorized to pay - $75.00 a day".

. Weiser, who was present in court, at the time did not dare ejury to the extent of denying said testimony when he testified ter.

spondent had three clear opportunities to deny petitioners test- ony but did not dare avail itself of any of the three. The test- ony stands uncontradicted and binding on respondent.

D CONCLUSION, Pg 3, lns 39 to 41, Pg 4, lns 1-3 IS A MISAPPLICATION THE LAW. 30 Compt Gen 220.

ippen Materials Co. v. US 160 ct cl 357; 312 F2d-403

NCLUSION RT, Pg 4, lns 4 to 6 IS A MISAPPLICATION OF THE LAW.

"A contractor in submitting a bid has a right to rely on positive representations made by the (gov't) agency."

F. Scholes v. US Ct Cl 1966; 357 F2d-96.

"Such representations amount to a warrantee and establish a predicate for a possible action for breach of contract if it is later discovered that the representations are untrue".

ssison Knudson Co. v. US 128 CtCl 156, 162, 120 FS 768.

Pg 4, lns 7 to 17 IS A MISSTATEMENT. Petitioner has never leged that respondent misrepresented the time required. Petitioner ers that respondent concealed from petitioner the true time quired.

"The government withholding cost information during negoteations entitled contractor to recover for a resulting loss".

gonere et al v. US 128 CtCl 156

teson Stolte Inc. v. US CtCl 4-8-1959

yder Lynch Motors v. US CtCl July 19, 1961

"The gov't no more betrays a contractor with a ruinous course of action by silence than by spoken word".

. Cardoza, J; Globe Woolen v. Unit Gas 224 NY 483, 489

lene Curtis Inc. v. US 160 CtCl 437, 443, 444.

Pg 4, ln 18: "And his constructive performance time was 140 days".

IS IS A MATERIAL MISAPPREHENSION OF FACT AND A MISAPPLICATION OF

W. Appendix A, Case 206-61.

Pg 4, lns 19-26 IS A MISAPPREHENSION OF FACT AND A MISAPPLICATION

THE LAW. Appendix A, Supra, Petitioners employment was for 155

ys in which to prepare himself to attend court as an expert

tness for respondent, an employment that did not cease with the

ling of his report, but would as he testified. RT 3-11-63, Pg 66,

s 2-4:

"At the time, August 8, 1959, that Mr. Dauber instructed me to proceed no further, I was not quite ready to testify. I would have been in another 30 days of work, possibly less. On August 8, 1959, petitioner had worked 128 days plus 30 days would be 158 days, under Bid 1 and 2, which excluded the minerals".

DEFS 4, in DEFS 2, Pg 2 para 1 and in the understanding on

nuary 6, 1959, there arose a contract implied in fact, to testify

to the minerals which both respondent and petitioner expected to

reduced to writing by a bid form prepared by Mr. Weiser and would

nount to at least 20 days of preparation for trial, of said
nerals.

ount Bros. Const Co. v. US CtCl 1953; 346F2·962

v. Dalles Military Rd 41 FS 497;

lliston on Contracts Sec. 610B Pg 534, Vol. 4.

cramento Nav Co. Salz 273 US 326

lliston on Contracts, Sec. 1293 Pg. 3691, Vol. 5.

Pg 4, lns 33 to 39. MISSTATEMENT: Apparently deveved from DEFS
. (Anticipated by Reg. Counsel IRS at the time) and advice thereof
mely for Mr. Weiser to arrange his trial calander accordingly.
tually, the duty of petitioner to the Treasury in J.G. Boswell
. v. Commr was discharged between Sept 30 and Oct 2 in conference
th Mr. Mark Townsend and Between Oct 5, and Oct 9, 1959 in
tendence in court as an expert witness. None of said days con-
icted with trials of 1836 ND and 1904 ND. The court can take
dicial notice of the fact that local courts usually refrain in
vor of Circuit Judges from Washington.

Pg 4, lns 29 to 33; Pg 5, lns 1 to 5: PURE SPECULATION ON THE
RT OF COMMR.

Pg 5, lns 5 to 27. MISAPPREHENSION OF THE FACTS AND THE LAW AND
MISAPPLICATION OF THE LAW.

titioner was not employed by respondent to perform specific
praisals. Petitioner was employed to attend pre-trial conferences
d attend court as respondents expert witness and to prepare himself

r said attendence. Petitioner did not seek out respondent but spondent particularly sought out petitioner. No complaint was er made to petitioner of his performance, qualifications or aracter. The only reason given the Attorney Gen. for not calling titioner for said attendence are given in DEFS 25, Pg 5, para 3, and 5, which are no reasons at all. Mr. Minton's statement, ra 3:

"Further conferences and interviews with Mr. Thomson convinced this office that the government would be better off to lose its investment ($6,750.) to June 30, 1959 (and a valuable expert witness whom respondent had gone to great trouble to procure and recommend to the attorney gen.) than to proceed further with him, as a consequence he was never notified to proceed".

3-11-63, Pg 95:

"Nobody has ever contacted me or given me any information at all as to what investigation he made".

3-11-63, Pg 98, ln 5:

"You were telling us you notified, Mr. Thomson - to get his bill in for services rendered, up to July 1959"???

A: Up to June 30.
Q: For work done up to that time?
A: For work up to that time.

3-11-63, Pg 95, lns 13 to 22: Regarding para 3, pg 5 DEFS 25Supra

Q: Did you ever call this to Mr. Thomson's attention?
A: Mr. Minton -- "I don't recall having done so".
Q: Did you have any conversation with Mr. Thomson after the first day of August 1959?
A: Mr. Minton -- "No, I don't think so".

Pg 5, ln 13 to pg 16. THE ONLY BASIS PETITIONER CAN FIND FOR
NCLUSION IS IN MR. PITTLES OPENING STATEMENT, RT 3-8-67, lns 14-
; PG 10, LNS 1-12. This is not evidence.

e actual policy of respondent is set out in RT 3-8-67, Pg 69,

s 4 to 10, Mr. Weiser.

E CONCLUSIONS DRAWN BY COMMR ON PG 5, LN 6 to 27, ARE BASED ON

) MATERIAL MISAPPREHENSIONS OF THE FACTS TO WIT:

1. That petitioners employment was terminated. See DEFS 25, Pg 5, Para 3.
2. That petitioners duty under his employment was completed when petitioner filed his report, See Appendix A, Case 206-61

) SAID CONCLUSION IS MISAPPREHENSION OF AND MISAPPLICATION OF

E LAW. THE LAW IS:

"So though a contract of employment contains no other express promise of the employer than to pay a stipulated compensation there is an implied promise to employ which is voilated by refusal to allow the employee to perform his duties as such".

lliston on Contract, Sec. 1293, Pg. 3684, Vol. 5.

"The rule is that a contract is to be construed, must strongly be against the party who prepares it and is applies to the US".

v. Newport News 178 F194

rrison v. US 7 Wall.688

ount Bros. Const Co. v. US CtCl 1965, 346 F2d 962

Pg 5, Para 8, lns 31 to 37 - MISAPPREHENSION OF FACT AND LAW AND

SAPPLICATION OF THE LAW.

Petitioner has proved conclusively that respondent misrespresented the per diem rate.

As to concealment of a fact material to petitioners bid: RT 3-8-67, Pg 24, lns 9 to 15: - The witness (Thomson) lns 20 to 25

"The fact was concealed from me that both Mr. Minton and Mr. Weiser knew at the time it would take at least 130 days to do this job of just appraising the fee land of the 36 parcels".

Pg 25, lns 4 to 11:

Commr: "You didn't ask them"?
A: "No".
Q: "And they didn't tell you"?
A: "And they didn't tell me".

Pg 26:

Q: "You stated information was with held from you at the time you wre employed"?
A: "Yes".

Pg 27, lns 10 to 12; lns 13 to 22: RT Pg 28, lns 5 - Mr. Thomson

A: "Yes your Honor, it caused me to bid lower both in time and in price than I should have or would have if I had known the facts".

, Pg 28: Answer by Thomson:

"I would have bid for more days, your Honor. I wouldn't have bid more per day because he told me that it was the highest he could pay".

though Mr. Weiser was in court when the above testimony was pre-

nted, he did not dare perjury to deny said testimony. RT 3-8-67,

67, lns 5 to 20; see comments on RT Pg 4, ln 7 to 17, supra.

lene Curtis Inc v. US 160 CtCl 437, 443, 444

Pg 5, ln 38-9

"Plaintiff is entitled to recover, under the terms necessarily to be implied into the contract".

SAPPREHENSION OF FACT. RT Pg 6, ln 16:

"Although the job was approximately 15 days short of completion".

ere is no foundation for this misstatement in the record.

APPREHENSION OF FACT AND LAW AND MISAPPLICATION OF THE LAW.

Pg 9, lns 25-29. There is nothing in the decision of 3-18-66 in the law of contracts to support this misapplication of the law. d misapprehension is based wholly upon Commr continuing mis-rehension of the prime object and purpose of petitioners employ-t. The prime object and purpose of petitioners employment by pondent was not the making of an appraisal and the filing of a ort, as fixed in the mind of Commr, but to attend court as res-dents expert witness in the trials of the parcels sought in 1836 and 1904 ND and petitioners duties under said employment were not ected to be completed until Sept 6, 1959. See discussion Report 4, lns 19-26 supra.

Pg 10, lns 1-13. THERE IS NOTHING IN THE RECORD EXCEPT THE TEMENT OF MR. PITTLE TO SUPPORT THIS CONCLUSION. See Discussion ort Pg 5, lns 13 to 16 supra.

Pg 10, Para 7, lns 1 to 7: REPORT Pg 11, lns 1 to 16: PURE CULATION BY COMMR. See Discussion RT Pg 4, lns 33 to 39, supra.

3-8-67, Pg 34, lns 20 to 26; Pg 35 lns 1 to 12:

Q: "Mr Thomson from Aug 8, 1959 to Jan 1, 1960, did you hold yourself in readiness to testify"?

A: "Yes, except for seven business - court days. I was on trial in Boswell case for four days and in conference with Mark Townsend, three days".

Q: "During that seven or eight days, did you receive and request to testify in the case you were working on"? (1836 ND and 1904 ND)

A: "No".

Q: "Out of Minton's Office"?

A: "No. I had already told Mr. Weiser at the inception of this thing, that I would have to testify for the Treasury that

Pg 11, lns 18-21 MISSTATEMENT. Mr. Weiser knew on Jan 6, 1959 petitioners obligation to the Treasury and that trial of J.S. swell v. Commr would be held on Oct calander of the Judge from shington.

Pg 11, lns 21-26 MISSTATEMENT: Respondent never indicated that stop-order was other than temporary; awaiting approval of the torney Gen.; or ever indicated to petitioner that petitioner would be called as an expert witness; the object of petitioners employ-nt.

3-8-67, Pg 32, ln 18:

"Did anybody ever tell you that you were not going to be used as a witness"

3-8-67, Case 206-61 Pg 32, ln 8: Answer - Thomson:

"I had no reason to believe other than that I would be called. It would seem to me stupid not to call me".

3-8-67, Case 206-61, lns 13 and 14:

"And it seemed incredible to me that the gov't would go to the trouble it did to hunt up an expert witness and then not use him".

Pg 12, para 9, ln 3 - irrelevant and immaterial to situation of expert witness employed by Dept of Justice, and based on the revelant, immaterial, irresponsible heresay testimony of Robert Rowe, over petitioners objections.

Pg 12, para 10 to ln 1, pg 13: THIS IS THE SAME MISAPPREHENSION the object and purposes of petitioners employment fixed in mrs mind as making of an appraisal and filing an appraisal rpt.

e discussion under RT Pg 5, lns 6 to 27, supra.

Pg 13, lns 4 to 9, PRE-TRIAL MIS-STATEMENT. See discussion RT

3, lns 20 to 34.

Pg 13, lns 9-21 - MIS-STATEMENT. See discussion RT, Pg 3, lns

-24; lns 34 to 39, supra.

Pg 13, lns 22-25 MISAPPLICATION OF THE LAW. See discussion

Pg 4, lns 4 to 6, supra.

, PG 13, lns 25 to 29 MISAPPREHENSION OF THE FACTS. See discussion

Pg 3, lns 39 to 41, Pg 4, ln 1 to 3, supra.

Pg 14, ln 20 to 26 IS A MISAPPLICATION OF THE FACTS AND OF THE

W.

APPENDIX C-C

POST TRIAL FILINGS BY PETITIONER, INCOPORATED INTO TRIAL BY REFERENCE.

APPENDIX C-C

. Original petition of May 29, 1965

. First ammended complaint of April 15, 1967

. Petitioners objection to motion to dismiss Case #174-65 of June 26, 1965

. Reponse to Pre-trial Order of August 3, 1965, undated

. Plaintiffs requested findings of fact of April 7, 1967.

. Motion to strike portions of respondents brief of June 16, 1967

. Opposition to defendants proposed conclusion of law June 16, 67

. Opposition to defendants proposed findings of fact - JUL 2, 1967

. Motion to strike of July 2, 1967.

. Petitioners response to respondents brief which was concluded in respondents requested findings of fact Pgs 7-11 of Jul 2, 67

. Opposition to defendants proposed findings of fact of Jul 2, 67

. Ltr of July 12, 1967

. Petitioners comments as to defendants comments and objections to petitioners proposed findings of fact of July 12, 1967

. Petitioners brief in support of petitioners 1st amended complaint.

APPENDIX D-D

FACTS ESTABLISHED BY DECISION OF COURT

3/18/66 AND REPORT OF COMMISSIONER.

APPENDIX D-D

ts Established in Decision of March 18, 1966:

That a contract was established.

The US Attorney at Los Angeles is a Contracting Officer in in procurement of "Expert Witnesses".

The Contracting Officer definetely needed plaintiffs' services as an "expert witness" in cases 1836 ND and 1904 ND; and sought out petitioner to fill said need and that petitioner was his man for the task.

At the inception of his employment, petitioner was dealt with as a potential expert condemnation witness..

Time was of essence of petitioners employment.

Petitioner is a Mining Engineer and a member of the American Institute of Mining Engineers. On many occasions petitioner has performed appraisal services for oil companies and private industrials involving oil & other mineral rights in various parts of the country.

The Bid Forms were prepared by respondent.

Where a state of facts exist from which an implied contract -- maybe justly inferred -- the court of claims has jurisdiction--.

The gov't did not establish that -- there was a reasonable likelehood that plaintiff could have become gainfully employed in order to mitigate damages.

Plaintiff -- customarily was paid $125. per day for appraisal services rendered away from his residence.

The U.S. Attorneys Office had paid other appraisers $50.(SIC) to $150. per day for their services.

An appraiser who is engaged to render an appraisal report in connection with a prospective condemnation trial is usually called as a witness at such trial and paid therefore.

No dissatifaction with the quality of plaintiffs' services was expressed before or later.

On Jul 19, 1965 the court denied without prejudice, defendants motion to consolidate both petitions for arguement.

However, it is usually intended that an appraiser engaged in connection with a condemnation action will testify at trial, (if needed SIC) and an appraiser is not usually discharged before completing his contract, except for cause.

Evidence indicates that another appraiser (Miles) attended pre-trial conferences and trial sessions for no more than 133 days (and probably much less) at various times scheduled from August 4, 1959 (SIC) to July 21, 1964.

For he maintained his offices in his living quarters in San Francisco.

. It is not proven that plaintiff was offered any such employment in that period.

. Plaintiffs customary compensation for appraisals outside of his San Francisco Headquarters was at the rate of $125. per day. He had done and was doing appraisal work for the U.S. Treasury at that rate.

. Unknown to plaintiff the U.S. Attorney paid from $50.(SIC) to $150. per day for appraisal services at relevant times.

. Plaintiffs qualifications seemed impressive enough on paper.

. He was qualified to appraise Mineral right. that Mr. Miles (or others).

. However, the defendants witnesses who participated in the contract negotiations (Menton and Weiser) did not catagorically deny the plaintiffs contention: (that the contracting officer misrespresented to petitioner that the highest rate he was authorized to pay was $75. per day).

. It was defendants intention in engaging plaintiffs appraisal services that he (plaintiff) should file an appraisal report, attend pre-trial conferences, and testify at condemnation trials.

. Time was of essence because the U.S. District Court was pressing the U.S. Attorney to bring the condemnation cases to trial by September 1, 1959.

Plaintiff was under the justificable impression that the appraisal work had to be completed appreciable prior to trial date.

Plaintiff had advised defendant on July 28, 1959 that he could be ready to testify by Sept 8, if he worked every day until then.

It is indicated in plaintiffs exhibits, 21 to 28, that pre-trial conferences and trial sessions as to the two condmnations cases were scheduled at various times for the period, Aug 24, 1959 (SIC) through Jul 21, 1964, for a total of approximately 133 days.

APPENDIX E-E

AUTHORITIES OF RESPECTIVE QUESTIONS RAISED

(NUMBER OF AUTHORITY EQUALS NUMBER OF QUESTION)

APPENDIX E-E

APPLICABLE TO RESPECTIVE QUESTIONS RAISED:

I

OCATION OF 5TH AMENDMENT

ch v. US 292 US 571

II

ITABLE JURISRACTION OF CT CL TO REFORM CONTRACTS.

cliffe Storage & Wharehouse Co v. US 125 CtCL 297; 112 FS 570

Boston Iron Wks v. US 34 CtCL 174

liam Camp v. US 239; US 221; 33 S. Ct 70

r Elect Co. v. US 60 CtCL 993

re & Trust v. US CtCL 364, 367

III

UIT SUBSEQUENT MAY BE BROUGHT

tatement of Judgements, Sec. 62(b), pg 256, para. 2

Judicata 65 Harv Law Rev (75)(76)(77)(78), pg 830

IV

ENDANT IS ESTOPPED FROM RAISING RES JUDICATA

te v. Alder (1942) 289 NY 34; 43 NE 2d 198

tatement of Judegments, Sec. 62(b), pg 256, para. 2

Judicata 65, Harv Law Rev 818, 830

ris v. Whitworth 211 SW 2d 101

e v. Smith 272 NW 747

te v. Miley 241 PAC 670

augh v. Osborne Mc Millan 205 NW 5

ced Bank & Trust v. Hunt 18 Cal App 2d 112

mbatty v. Marz 148 SW 1029

land v. Spear 83 NYS 2d 21

ch v. Pinner 201 P 2d 1948

enfield v. Mather 194 PAC 2d 1

agas v. Vidal 170 F 2d 90

:green v. Numan 141 F 2d 927, 929

ver v. Sharp 34 SW 262

:es Federal Practics, Sec. 0, 443

nwell v. Sac. Co. 94 US 351

Shoe Machy v. US 258, US 451

:oid v. Medco Inv. 320 US 661

V

RESPRESENTATION IS GROUND FOR REFORMATION

:ison Knudsen v. US 128 CtCL 156; 120 FS 168

nch Banking v. US 342, US 893

Comptroller Gen 220

:liffe Stge & Whse v. US 125 CtCL 297; 112 FS 570

liston on Contracts, Sec. 1487, pg 4153, Vol. 5.

oin on Contracts 467-3A

:ide & Wachtel - Government Contracts 13:110

pen Materials v. US 312 F 2d 408

shnick v. US 123 CtCL 197; .105 FS 837

Water Proofing v. US 133 CtCL 911; 137 FS 713

rison Knudsen v. US 170 CtCL 712; 345 F 2d 535

zier Davis Const Co. v. US 100 CtCL 120

vey v. US 8 CtCL 501, 512, 513

Boston Iron Wks v. US 105, US 671

v. Jones 131, US 1, 14, 19

v. Miliken 202 US 168, 173, 174

liam Camp v. US 239, US 221, 227, 233

erlind v. US 240, US 531, 533, 534

tsville Oil Mill v. US 271, US 40, 49

elhurst Oil Mill v. US 70 CtCL 334, 346, 347

und J. Rappolie v. US 98 CtCL 499

ering v. Garrisgues 75 CtCL 574

v. Atlantic Dredging 253 US 1

lisbach v. US 233, US 165

VII

CEALMENT IS GROUND FOR REFORMATION

de Woolen v. Utica Gas 224 NY 483; 121 NE 378

ene Curtis Inc v. US 160 CtCL 437, 443, 444

zier Davis Const Co v. US 100 CtCL 120

eson Stolte Inc v. US CtCL April 8, 1959

der Lynch Motors v. US CtCL 7-19-1921

onere v. US 125 CtCL 156

Scholes v. US CtCL 1966; 357 F 2d 963

ering v. Garrigues 75 CtCL 566

rison Knudsen Const Co v. US 128 CtCL 156, 162; 120 FS 768

v. Spearin 248 US 132, 137

Water Proofing v. US 133 CtCL 911, 915; 137 FS 713

ole Midwest v. US 125 CtCL 818-113 FS 278

unt Bros Const Co v. US CtCL 1965; 246 F 2d 962

v. Atlantic Dredging 253 US 1

rison Knudsen Const Co v. US 345 F 2d 535

ond J. Rappolie v. US 98 CtCL 499

Boston Iron Wks v. US 105, US 671

v. Jones 131 US 1, 14, 19

v. Milken 202 US 168, 173, 174

liam Camp v. US 239, US 221, 227, 233

VII

TRACT IMPLIED IN FACT

den v. Austin 5QB 671, 683 per Lord Denman

tty on Contracts, Sec. 148, pg 74

liston on Contracts, Sec. 94, pg 338, Vol. 1.

tetter v. Park 137 US 30

ers v. Beadle 183 Cal App 2d 691

TRACT INCLUDES NECESSARY IMPLIED PROVISIONS

liston on Contracts, Sec. 610, pg 533, 534, Vol. 4.

CJS, Sec. 328

) Navig v. Salz 273 US 326

v. US 117 CtCL 552

:ley v. US 133 CtCL 226; 135 FS 542

.iston on Contract, Sec. 1293, 1293a, Vol. 5.

'. Speed 75 US 94

ican La France v. Shenandoah 115 F 2d 866

. v. Waxberg 237 F 2d 936

ruff v. New State Ice 197 F 2d 36

in v. Campanaro 156 F 2d 127

or Spailing Steel v. Slater

VIII

THREE CONTRACTS CONSTITUTE ONE CONTRACT

rately executed instruments by same parties as to same subject

ne contract.

mus v. Westmoreland 120, Cal App 2d 537

ion 1642 Cal Civil Code

speed v. Gr. West Power 33 Cal App 2d 245

eson v. Nev Mutual 86, Cal App 342

s v. Lux Ll., Cal App 21

h v. Bank of America 2 Cal App 2d 214

:ley v. Fisk 179 Cal 748, 754

1646 Cal Civil Code

banks Morse v. Consol Fish 190 F 2d 817

1642 Cal Civil Code

PE OF AUTHORITY AND RANGE OF DUTIES OF EXPERT WITNESS

t v. Miller 115 PAC 932

ner v. Rozelle 45 PAC 2d 561

X

TRACT MUST BE CONSTRUCED AGAINST DEFENDANT

v. Newport News 178 F 194

rison v. US 7, Wall. 688

unt Bros Const Co v. US 346 F 2d 962 (CtCL 1965)

ebe & Sons v. US 332 US 407

ch v. US 292 US 571

Op Atty Gen 555

edman v. US 314 F 2d 506

tern Contrg v. US 144 CtCL 318

TRACT WILL NOT BEAR LITTERAL INTERPRETATION

liston on Contracts, Sec. 610, pg 533, Vol. 5.

XI

PRIME OBJECT AND PURPOSE OF PETITIONERS EMPLOYMENT

liston on Contracts, Sec. 619, pg 733(6), Vol. 4

k v. Amer Malt 169 F 582

n v. Towne 5 Wall. 689, 699

Gar Mfg Co v. US 199 CtCL 60; 351 F 2d 972

Casualty v. Sinclair 108 F 2d 65

let Embroidery v. Derwent 254 NY 179

-Nev RR v. US 127 FS 547

ader Const v. US 186 CtCL 58-4-6-60

XII

CLEAR INTENTION OF THE PARTIES

din v. Austin 5 QB 671, 683 per Lord Denman

tty on Contracts, Sec. 148, pg 74

liston on Contracts, Sec. 94, pg 338, Vol. 1.

l v. Laxberg 237 F 2d 936

nt Bros Const Co. v. US (CtCL 1953) 346 F 2d 962

Amer Phillips v. US (CtCL 1966) 358 F 2d 980

E WAS AN ENFORCEABLE OBLIGATION UPON PLAINTIFF

3 and DEFS 8, so specify

2, so specifies

4; 5, 13 and 14, so specify

object and purpose, the clear intent, the manifest contemplation oth parties at the inception of the contract all constitute an rceable obligation on plaintiff.

. Maryland Gas Co 64 FS 522

r Mill of Amer v. US 72 FS 603 (CtCL)

o Falls BP v. US 107 FS 952

ttas v. US 60 FS 171

Trading v. US 172 FS 165

liston on Contracts, Sec. 1293, pg 3691, Vol. 5.

Casualty Co v. Sinclair 108 F 2d 65

let Embroidery Co Inc v. Durwent 254 NY 179

field v. Stocco Homes Inc. 26 NY 246

liston, Sec. 610B

tetter v. Park 137 US 30

XIV

RE WAS AN EQUALLY ENFORCEABLE OBLIGATION ON DEFENDENT

re & Trieste v. US 43 CtCL 364, 367

ly v. US 31 CtCL 361

holas Ittner v. US 43 CtCL 336

e Pro Equip Co. v. US (CtCL 1965) 347 F 2d 509; 384 US 917

ur Mills of Amer v. US CtCL 7-7-47-72 FS 603

Canal Co v. Hill Wall.94

at Nor RY v. US 236 F 433

liston on Contracts 1293, pg 3684, Vol. 5.

son Trans v. Jaffa 143 F2d 340

Flood v. Bates 283 F 367

llers Case 19 CtCL 581

ttingus Case 26 CtCL R-392

ut v. Hall & Bang 27 CtCL 352

don v. Taxing Dist 104 US 771

ish v. US 100 US 500

v. Smith 94 US 214

v. Mueller 113 US 153

neiders Case 19 CtCL 547

v. Behan 13 CtCL R687; 110 US 338

v. Speed 3 Wall. 77, 84

ng etc Pile Co v. US 90 CtCL 4

ittas v. US 101 CtCL 748, 766

TRACT IS BOUND TO RESCIND

Liston on Contracts, Sec. 1293, pg 3684, Vol. 5.

tetter v. Park 137 US 30

ein on Contracts, Vol. 3, Sec. 557, pg 245

tatement of Law of Contracts, Sec. 240

XVI

21 CANNOT BE CONSTRUED AS TERMINATION

lor v. Tulsa Trib 136 F 2d 981, 983

d v. McCormick 75 WASH 61; 134, PAC 676, 679

rbon Contracts, Sec 1095, 515

APPENDIX F-F

TUAL REFERENCES TO RECORD

LIFICATIONS AS AN EXPERT WITNESS

MISREPRESENTATION AS TO PRICE

CONCEALMENT AS TO TIME OF PERFORMANCE

PRIME OBJECT AND PURPOSE OF EMPLOYMENT

MUTUAL INTENTION OF PARTIES

CONTRACTORS CONSTRUCTION OF CONTRACT

ENFORCEABLE OBLIGATION ON PLAINTIFF

APPENDIX F-F

tual References to Record

QUALIFICATIONS OF PLAINTIFF AS EXPERT WITNESS

A. Expert Witness for Treasury at $125. per day in JG Boswell v. Comms in 1959. RT 3-8-67, pg 5, ln 25; RT Pg 21, ln 25

B. Expert witness for Cal Div of Highways at $125. per day. RT 3-8-67, pg 21, ln 21

C. Usual fee at $125. per day - Commr RT DEFS 4; DEFS 25, pg 3, para 2 & 3.

D. RT 3-8-67, pg 39, ln 26; pg 40, lns 26 to 41 to ln 1-26; pg 40, ln 5, also in cases with L. Sando & Bernie Evans.

MISREPRESENTATION AS TO PRICE PER DAY

RT 3-8-67, pg 39, lns 19 to 40, ln 26 to pg 41, ln 26 to pg 42, ln 4

RT 3-8-67, pg 22, ln 1 to ln 4; RT 3-8-67, Pg 5, lns 2 to 8.

untruth of said representation is proved in RJL-C MAC M 33-5-8-698 & 1034 stated 4/29/59 - attached to appendix B. Also, Minton and Mr. Weiser were in court on 3-11-63, when plaintiff testified and Mr. Weiser on 3-8-67, when plaintiff again so tified. But neither one dared perjury to the extent of tting said testimony. Comms report stated that neither denied l testimony categorically.

RT Pg 62, lns 21 to pg 63, ln 17; pg 64, lns 1 to 4

CONCEALMENT OF TIME ACTUALLY REQUIRED

Case 206-61 - RT pg 36, lns 23-25; pg 37, lns 1 to 10;

Case 174-65 - RT Pg 23, line 13*; pg 24, lns 1-8, lns 9-14;

lns 20-25

RT Pg 25, ln 8-9*; ln 12-31;

RT Pg 27, ln 1B-17; RT Pg 28, ln 5-7*; ln 14-23

RT Pg 37 to RT Pg 38, ln 15

RT Pg 43*

DEFS 4, DEFS 5, DEFS 13, DEFS 14

t known to plaintiff on 3-11-63 when introduced by Mr. Pittle

rial of 206-61. Plaintiffs 1-27 - First known to plaintiff

discovery proceedings in 174-65, said concealment was not

ed by Mr. Weiser on 3-8-67, Pg 67, ln 17-20.

PRIME OBJECT AND PURPOSE OF EMPLOYMENT

EXPERT WITNESS - DEFS 4, DEFS 5, DEFS 13 - DEFS 14; DEFS 3;

DEFS 8, RT 3-8-67, pg 5, ln 5; pg 7; ln 19;

MUTUAL INTENTION OF PARTIES - DEFS 25, pg 3, para 2 and 3;

DEFS 4, pg 1, para 2; DEFS 2, DEFS 3, ltr 2-3-59, DEFS 4, pg 2,

para 1, DEFS 5, DEFS 6, DEFS 7, DEFS 9, DEFS 12, DEFS 13, pg 1,

para 3 to pg 2; DEFS 15, DEFS 16, DEFS 19, DEFS 22 and DEFS 29.

AL CONTEMPLATION OF PARTIES

DEFS 3 ltr, DEFS 9, DEFS 12, DEFS 15, DEFS 16, DEFS 19, DEFS 22,

RT pg 38-67, pg 5, ln 15; pg 6 & pg 7; RT 3-8-67, pg 31 ln

18-26 RT pg 37, ln 13-14; RT pg 38, ln 13-15; pg 41 - pg 56,

.7-19, pg 57, ln 17-18, pg 57, ln 25, ln 1, pg 58; pg 58, .5-26.

RACTORS CONSTRUCTION OF CONTRACT

g 59, lns 1 to 16

ENFORCEABLE OBLIGATION UPON PLAINTIFF

DEFS 3; DEFS 8; Prime object and purpose of employment; mutual intention of parties, mutual contemplation at initiation of contract. Plaintiffs' understanding. RT 3-8-67, pg 6, ln 17 to ln 3, pg 7; pg 7, lns 12 to 19; RT pg 31, ln 12 to pg 32, ln 17, RT Pg 33, ln 18 to 21; RT 34, ln 1 to 11; PG 34, ln 22 to 26; pg 45, lns 22-26; pg 46, ln 1-4. RT pg 49, lns 1 to 9; RT pg 53, lns 10 to 15; RT Pg 36, lns 17 to 26.